

Retirement age judgment

The Constitutional Court, retirement age and uncertainty: Employers be aware

The recent judgment of the Constitutional Court in *MISA and Another v Great South Autobody CC t/a Great South Panelbeaters; Solidarity o.b.o. Strydom and Others v SITA SOC Limited*, which was handed down on 20 December 2024, creates legal uncertainty regarding the interpretation of the consequence of an employee reaching the normal retirement age or agreed retirement age.

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Employers must be aware, and understand the impact of, the fact that the judgment now provides for three different and mutually exclusive interpretations of what it means, and the consequences of an employee reaching the normal retirement age or agreed retirement age.

The importance of an employer understanding the legal position cannot be overstated because failure to dismiss an employee who has reached the normal retirement age or agreed retirement age will constitute unfair discrimination, render the dismissal automatically unfair and entitle the employee to remuneration that is equal to 24 months' remuneration (*inserted by Labour Guide for clarity – if the employee is later dismissed in the absence of an agreement*). Many employers have fallen victim to not only dismissing employees in this context unfairly, but simultaneously dismissing several such employees unfairly, which resulted in material risk and prejudicial (divisive) impact on their workplaces.

That said, we set out the three interpretations provided in three judgments (**none being a majority**) of the Constitutional Court in this matter.

The first judgment

A dismissal based on age is fair if the employee is dismissed on the exact date upon which they attain their normal or agreed retirement age. A dismissal based on age on any later date is automatically unfair. The exception is that an employer may fairly dismiss an employee based on age and on a date later than this exact date in terms of an agreement that the employer may dismiss the employee on the last day of the month within which the employee has attained their normal or agreed retirement age.

The second judgment

A dismissal based on age is fair if the employee is dismissed on the exact date upon which they attain their normal or agreed retirement age or within a period thereafter justifying the inference that the employer had not elected to not dismiss the employee based on age. As such, an employer ought to dismiss the employee within a reasonable

period after they have reached their normal or agreed retirement age, and failure to do so would be indicative of an election not to dismiss the employee based on age.

The third judgment

A dismissal based on age is fair if the employee is dismissed on the date upon which they attain their normal or agreed retirement age or on any date thereafter.

Conclusion

An employer, therefore, currently has three potential avenues available to it when dealing with an employee who has attained their normal or agreed retirement age. The first judgment is the most conservative approach, whereas the third judgment is the least conservative approach. It is noteworthy that the third judgment represented the legal position before this latest judgment of the Constitutional Court.

As such, it remains to be seen how the Labour Court and the Labour Appeal Court will deal with the next dispute in this regard. Until then, an employer has three avenues available to it, and ought to choose the one that best suits its interests at any given point in time, subject to fairness.

